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No. 99-168

In The

Supreme Court of the United States

JOHN McCLINTOCK and
CHERRYHILL ASSOCIATES, INC.,

Petitioners,

v.

JOHN EICHELBERGER, JR.; BRAD COBER;
ALEXA FULTZ; ROBERT WILL; JOHN EBERSOLE;
and SOUTHERN ALLEGHENIES PLANNING
AND DEVELOPMENT COMMISSION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

Petitioners, Jon McClintock ("McClintock") and Cherryhill Assoc. Inc. ("Cherryhill") seek to overturn the decision of the United States Court of Appeals for the Third Circuit, which affirmed a grant of a motion to dismiss by the United States District Court for the Western District of Pennsylvania in favor of the Respondents, John Eichelberger, Jr., Brad Cober, Alexa Fultz, Robert Will, John Ebersole and Southern Alleghenies Planning and Development Commission (the "Commission").

The Court of Appeals correctly applied the principles set forth in two recent decisions of the United States Supreme Court, which created a cause of action for independent contractors whose long term contractual arrangements with a municipal government were terminated in retaliation for activity protected by the First Amendment of the United States Constitution. The Court of Appeals held that these cases had no application to a situation involving a new contract in which none of the bidders had any on-going contract with the public entity.

The Court of Appeals also correctly held that the claim set forth in this Petition by McClintock and Cherryhill – that all contractors are entitled to First Amendment protection, even when bidding on a new contract – was not properly raised by the Petitioners in their Amended Complaint.

II. STATEMENT OF FACTS

The Commission was formed to promote economic development in six Pennsylvania counties. The individual

Respondents are members of the Commission's Executive Board.

In 1997, the Commission sought proposals to perform marketing services in connection with a new economic development program, the TEAM PA Initiative. The purpose of the proposed marketing program was to familiarize local business leaders with the new program before the Commission's staff began a series of interviews with business leaders concerning economic development issues. None of the consultants submitting proposals for this contract had ever performed this marketing service for the Commission.

McClintock and Cherryhill had provided some services to the Commission in the past, but had no existing agreement to provide marketing services of any kind to the Commission at the time the proposals were submitted. McClintock and Cherryhill had a contract in 1985, a dozen years before TEAM PA, to provide seat belt safety education and a 1992 arrangement to provide materials related to the Olympics. Since that time, they have served solely as a vendor, selling magnets, vinyl banners, bags and Slinkys to the Commission.

On May 21, 1997, the Executive Board of the Commission, the body with the authority to enter into contracts, rejected the bid submitted by McClintock and Cherryhill and awarded the marketing contract to another bidder, 2S Graphic Designs.

III. REASONS FOR DENYING THE WRIT

A. The United States Supreme Court has provided clear guidance on the issues raised, which were followed by the Court of Appeals for the Third Circuit.

During the last twenty years, this Court has outlined protections that are available to public employees under the First and Fourteenth Amendments. *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). This Court, however, has been cautious and restrained in extending such protections to independent contractors seeking contractual relations with entities acting under color of state law.

Two recent decisions of this Court extend the protections of the First Amendment to independent contractors in cases where their contracts with public entities have been terminated in retaliation for their exercise of protected speech. *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668 (1996) and *O'Hare Truck Services, Inc. v. City of Northlake*, 518 U.S. 712 (1996).

In *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, the Court held that the First Amendment protected a contractor from termination or prevention of automatic renewal of his government contract in retaliation for his exercise of free speech. In that case, the contractor, Umbehr, had provided trash hauling services to the defendant for nearly ten years. In 1990, the board of county commissioners terminated his contract, allegedly in retaliation for his outspoken criticism of the commissioners.

Similarly, *O'Hare Truck Services, Inc. v. City of Northlake*, was commenced by a tow truck operator who had served the City of Northlake for nearly thirty years. O'Hare commenced suit after it was removed from the rotation list of tow truck operators providing services to the City, allegedly for refusing to make contributions to the mayor's election campaign and openly supporting the mayor's opponent.

The Court held in both cases that, under the facts alleged, it was improper to *terminate* an independent contractor's *existing* contractual relationship with a municipal body in retaliation for the exercise of First Amendment rights. There is a significant difference between these cases and the facts alleged by the Petitioners, McClintock and Cherryhill.

In each of the cases discussed above, the aggrieved contractor had been providing on-going services to the municipal entity for many years and was *terminated* for allegedly unconstitutional reasons. In *Umbehr*, the contractor had been providing trash hauling services since 1981, and was not terminated until 1991, after a continuing ten year relationship. In *O'Hare*, the contractor had been on the tow truck operator rotation list since 1965, nearly thirty years, prior to its removal.

This Court limited its decision to the facts presented, specifically, to the *termination of existing contractual relationships* and excluded independent contractors bidding on new contracts.

The Court noted in *Umbehr*:

> Finally, we emphasis the limited nature of our decision today. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for *new government contracts* who cannot rely on such a relationship.

Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. at 685 (emphasis added).

In emphasizing the limited nature of the decision, the Court was responding to explicit concerns that wholesale incorporation of independent contractors seeking new contracts into the previous line of cases governing public employees was not warranted and would imprudently expand the scope of potential litigation before the Court. The Court carefully balanced the need to protect the independent contractor's reliance on existing, long-term contracts – an interest which closely mirrors the employment relationship – with one wholesale federalizing of the public bidding process for new contracts.

An acceptance of Petitioners' claim to First Amendment protection would have consequences for public bidding far beyond those intended by this Court. Instead of providing protection to contractors who have already been selected to provide services and who, presumably, have been providing services in adequate fashion, Petitioners' theory would provide a basis for suit in federal court by any dissatisfied bidder who wishes to sell a completely new type of goods or provide a wholly new

service to a public body.[1] Whenever a municipality, school district, municipal authority or other political subdivision requests proposals for any type of goods or services, the governing body could be forced to litigate its reasons for rejecting nearly every single bidder submitting a proposal.

Petitioners' theory would expand the application of First Amendment principles far beyond the boundaries permitted by this Court's prior decisions affecting independent contractors. It would lead to a risk of litigation and inefficiencies far beyond those envisioned by the Court in its previous decisions.

It is respectfully suggested that it is inappropriate to upset the delicate balance established by this Court by a wholesale expansion of the principles set forth in *Umbehr* and *O'Hare* to any potential, unsuccessful bidder for a completely new product or service.

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[1] Petitioners argue the injustice of extending First Amendment protection to Contractor A, who has a contract for trash collection, while denying it to Contractor B, who is trying to obtain the same contract. This hypothetical situation, however, has no application to the case before the Court because Petitioners, McClintock and Cherryhill, were not bidding to replace an existing consultant on the TEAM PA project. Indeed, none of the bidders had provided this service to the Commission in the past, because it involved a completely new project. The actual facts of this case would be a poor basis for resolving Petitioners' hypothetical example.

B. The Petition does not satisfy the criteria set forth in Rule 10 setting forth Considerations Governing Review on Certiorari.

The Petition in this case does not meet the criteria set forth in Rule 10 for a case appropriate for review by this Court.

As noted above, this Court has recently provided guidance to lower courts on the application of First Amendment principles to independent contractors. In doing so, the Court did not determine that independent contractors should be treated as interchangeable with public employees. Rather, after a careful balancing of interests and considerations, the Court extended First Amendment protection to those independent contractors whose circumstances most closely resemble the situation of public employees – i.e., contractors with an on-going, long-term contractual arrangement that has been terminated.

There is no conflict between the decisions of various courts of appeals on this issue. To the contrary, research indicates that the decision of the Court of Appeals for the Third Circuit in this case is the sole decision of a federal appellate court which has dealt with the questions raised. In fact, the lower courts have had extremely limited opportunity to apply the principles outlined by the Court in the *Umbehr* and *O'Hare* decisions. This makes it a singularly inappropriate case to reopen and reconsider the meaning of this Court's recent decisions in *Umbehr* and *O'Hare*.

C. The issues raised by the Petition were not raised in the Court below.

The primary issue allegedly raised by the Petition, whether an individual or company can be denied a new government contract that has never been awarded in the past, in retaliation for the exercise of First Amendment rights, was not raised by the Petitioners in their pleadings below. As noted in the Court of Appeals' opinion, the Amended Complaint in this case was framed solely in terms of a termination of an existing contractual relationship in violation of the First Amendment. The Court of Appeals noted that the Petitioners "pled this case in the district court relying on their on-going relationship with Southern Alleghenies and thus the viability of their claim depends on their ability to demonstrate that they had such a relationship." (Petition, p. 10a). The Court went on to determine that the on-going relationship alleged by the Petitioners was not the type of contractual arrangement protected by the principles outlined in this Court's decisions in *Umbehr* and *O'Hare*.

Now, the Petitioners attempt to reframe their case as a claim for First Amendment protection for all bidders on public contracts, regardless of whether they have had a previous relationship with the governmental body. This issue cannot be placed before this Court, because it was not appropriately pled and raised in the District Court.

IV. CONCLUSION

This Court has provided clear guidance on the issue of First Amendment protection for independent contractors whose business arrangements are terminated in retaliation for their exercise of First Amendment rights. There is no conflict between the courts of appeals with respect to the application of those principles. In fact, the lower courts have had limited opportunity develop and apply the guidance already provided by this Court. Moreover, the issue raised in the Petition was not properly raised by Petitioners in their pleadings below and, therefore, it is not an appropriate issue to be considered by this Court. For these reasons, it is respectfully requested that the Petition be denied.

Respectfully submitted,

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